IN THE HIGH COURT OF UTTARANCHAL, NAINITAL.

No. 10- COURT'S ORDER WHETHER THE CASE IS OR IS NOT APPROVED FOR REPORTING.

[Chapter VIII, Rule 32(2) (b)]

Criminal Appeal No. 162/2001
(Old No. 544/1986)

Ishwari prasad … Appellant.

Vs.

State .. Respondent.

AND

Criminal Appeal No. 175/2001

Mohan Singh Appellant.

Vs.

State Respondent.

Decided on 06-09-2005

A.F.R. (Approved for Reporting)
~~Not Approved for Reporting~~

(Irshad Hussain, J.)

(B.S.Verma, J.)

Dated: 06-09-2005.

In the High Court of Uttaranchal, at Nainital.

Criminal Appeal No. 1823/2001
(Old No. 544/1986)

Ishwari Prasad S/o Madan Ram
R/o Village Gairar Talla P.O.
Gurudwara Banz,District Almora .. Appellant.
Vs.
State .. Respondent.

AND
Criminal Appeal No. 175/2001
(Old No. 967/1986)

Mohan Singh S/o Ganga Singh
R/o Village Kaphari Post Kantli
P.S. Almora, District Almora .. Appellant.
Vs.
State .. Resp-ondent.

Sri R.P. Nautiyal, learned counsel for the appellant.
Sri Amit Bhatt, learned A.G.A. for the State.

Coram: Hon'ble Irshad Hussain, J.
Hon'ble B.S. Verma, J.

Dated: 06-09-2005

(P.C.):

Accused Ishwari Prasad and Mohan Singh have filed appeals from their conviction and sentence to imprisonment for life under Section 302/ 34 I.P.C. and sentence to seven years R.I. under Section 394 I.P.C., per judgment dated 3.2.1986, passed by the then Sessions Judge, Pithoragarh, in sessions trial No. 13/1983, which was consolidated with sessions trial No. 7/1983, in which the accused was Bhopal Singh. Bhopal Singh accused had died and in his appeal (criminal appeal No. 162/2001- old No. 544/1986) an order of abatement under Section 396 of the Code of Criminal Procedure was passed on 12-4-2004.

2- On 21.4.1982 at about 7 or 7.30 A.M., four person allegedly came to the tea-shop of Hayat Singh (P.W.1) in Didihaat. They took some refreshment and went away. They again came at the tea-shop at about 10-10.30 A.M. and took their noon meal. At that time they inquired from the said witness as to how they will be able to reach Bageshwar. They were told that at this hour of the day no conveyance will be available to take them to Bageshwar. Thereafter

all these four left that place and were then able to contact the driver of truck No. USZ 4470, which was going towards Thal. The driver of this truck was Chatur Singh and cleaner was Mohan Singh (P.W.3). All these four persons were given lift in the truck which reached Thal at about 5 P.M. At that place the truck stopped on the road near the Thal Police Out Post and all these four alighted there from the truck.

3- It is also the case of the prosecution that at that place another truck USZ 4286 also reached after some time. Navin Chandra Pandey deceased was the driver of this truck and whereas witnesses Shankar Singh (P.W.4) and Laxman Ram (P.W.5) were the cleaners on it. These four persons contacted the driver and requested him to given them lift so that they may take up journey right up to Bageshwar. The driver however told them that he will have his night halt at that place and will be leaving for Bageshwar next morning. All these four persons then decided to remain there so that they may travel in the said truck in the morning after having some talk with the driver in the presence of these cleaners.

4- According to the prosecution at about 4 A.M. during the dark hours of the early morning of 22-4-1982 these four persons dragged the driver Navin Chandra Pandey from the truck while they were all armed with revolver, stain-gun and knife as they wanted to rob the driver of the money which he was carrying in a bag. These four persons were able to see the bag when the driver took out some money for payment for his night meal at the hotel at that place in the vicinity of Police Out Post Thal. These four miscreants were demanding the bag of the money and when they could not succeed the driver was dragged out but the two cleaners Shankar Singh and Laxman Ram out of fear could not intervene and rescue the said driver of the truck. After some time these miscreants called upon the cleaners to part with the bag of the money of Rs. 8,000/-. The bag was handed over to them out of fear of dire consequences and thereafter they decamped from there. Both these cleaners however remained confined in the cabin of the driver of the truck due to the fear as they wanted to keep themselves safe from the clutches of these miscreants. In the morning at about 5 A.M. Chatur Singh, the

driver of truck No. USZ 4470, however, came to the said truck USZ 4286 and then these two cleaners named came out and told all about the incident which happened some hours before and in which the driver of the truck, Navin Chandra Pandey was dragged out of the cabin by the four miscreants. They then started making search of Navin Chandra Pandey whose dead body was, however, found lying nearby in a ravine underneath a bush. The wrist watch of the driver and keys of the truck were found missing.

5- It is also the case of the prosecution that on the dictation of cleaner Laxman Ram (P.W.5), co-cleaner Shankar Singh (P.W.4) prepared the written report, Ext. Ka.11. Both of them then went to the Police Out Post, Thal and delivered the written report there at 6.30 A.M. on 22.4.1982 and on its basis check F.I.R., Ext. Ka.2 was then drawn by the Clerk Constable who also made relevant entry in the general diary so as to register a case under Sections 394/ 302 I.P.C. against the four unknown culprits. The investigation of the case was taken up by S.I. G.R. Bhatt, who after initial formalities of the investigation, reached the seen of the incident and held inquest on the dead body of Navin Chandra Pandey, deceased to prepare the inquest report, Ext. Ka.7 and relevant documents which were to be sent with the dead body for autopsy. Dr. V.K. Tandon (P.W.2), Superintendend of B.D. Pandey Hospital, Pithoragarh conducted post mortem examination on the dead body at 11.15 A.M. on 23.4.19852 and prepared the post mortem examination report, Ext. Ka.1. As many as eight ante mortem injuries on various parts of the body were found and on internal examination pleura was found punctured and 6th rib was found cut and fractured under ante mortem injury Nos. 5 and 6. The lungs were also found punctured and there was about two liters dark fluid in the chest cavity. In the opinion of the Medical Officer the death was caused due to shock and haemorrhage as a result of ante mortem injuries about a day ago, indicating that the murder was probable committed at the time as alleged by the prosecution.

6- Later on the investigation of the case appear to have been taken up by S.I. D.C. Kukreti, incharge Police Station, Thal where the copy of the relevant check F.I.R. and G.D. report was received

from the Police Out Post, Thal and the regular crime number was allotted to the incident in question according to the rules. It is the case of the prosecution that on the basis of the leads provided during the investigation, accused Mohan Singh was taken into custody on 17-6-1983 and whereas accused Ishwari Prasad was arrested on 18-6-1983 and both of them were thereafter put to test identification on 8-8-1983 and after the result of the same being received by the Investigating Officer, they were charge sheeted on 6-9-1983 per charge sheet, Ext. Ka.9 placed by S.I. D.C. Kukreti. On cognizance being taken, they were committed to the Court of Sessions and faced trial and were convicted and sentenced per judgment dated 3-2-1986 by the then Sessions Judge, Pithoragarh,
as stated above.

7- We have heard the learned counsel for the appellants and the learned A.G.A. and have gone through the record and the judgment under appeal with the help of both the learned counsel.

8- The learned counsel appearing on behalf of the appellants in the first instance submitted that there is absolutely no substantive evidence to indicate as to what was the clue and what was the lead available with the police so as to lay hand upon these accused or any of them. During the investigation of a crime police agency is required to hold identification parade for the purposes of enabling a witness to identify a person who is alleged to have committed the offence, particularly when such person is not known to the witness or is not nominated in the F.I.R. by the informant. The occasion to put such a person to test identification parade arise only when the investigating agency has in its possession some material prima facie indicating involvement of the person in the commission of the crime. Therefore, in a case based on identification evidence, there is a requirement for the prosecution to place on record the substantive evidence leading to create a suspicion or prima facie belief that a particular person was involved in the commission of the alleged crime and thereafter according to the law and procedure prescribed, such a person is put to test identification in order to

test the veracity of the person who may prove implication of such person in the crime and also to fix his identify. There can be no gain saying that out of five witnesses examined in this case, none gave any evidence to indicate that there was evidence with the police to enable them to raise grave doubt and suspicion about the involvement of these accused or any of them in the commission of the instant crime. No doubt Section 172 (2) of the Code of Criminal Procedure permits a court to peruse the case diary to verify certain steps taken during the investigation by the investigating agency but the same can not be used as a substitute for the evidence of the prosecution and from the perusal of the judgment under appeal it appear that the learned Sessions Judge went on to use the case diary in the trial to observe that there were clues available with the police to lay their hand upon these accused who were then taken in to custody and were put to test identification. We are convinced that it was legally beyond the scope of the dispensation of criminal justice because only on the basis of the substantive evidence some inferences could have been drawn in favour of the prosecution.

9- There can be no doubt that the death of Navin Chandra Pandey was homicidal and whosoever caused his death had intended to commit his murder. We also do not find any infirmity in the evidence of P.W.4 and P.W.5, viz. Shankar Singh and Laxman Ram about some incident having been taken place at about 4A.M. on 22-4-1982 near the Police Out Post, Thal and in that incident the murder of Navin Chandra Pandey was committed by some unknown culprits. Since the case is based on identification evidence, learned Sessions Judge has, on his appreciation of the evidence of the witnesses of the identification, held their evidence as credible and reliable. Learned counsel appearing on behalf of the accused assailed the approach of the learned Sessions Judge and argued that the evidence of identification witnesses was not at all convincing and worth reposing confidence therein so as to impinge the liability of commission of the crime on these accused or any of them. therefore, we are required to reappraise and reassess the evidence of the identification to see as to whether the evidence is

reliable to prove that these accused or any of them were responsible for committing the crime of the murder and robbery as alleged by the prosecution.

10- Mohan Singh (P.W.3) was declared hostile as he did not support the prosecution case. We have thus the evidence of Hayat Singh (P.W.1), Shankar Singh (P.W.4) and Laxman Ram (P.W.5) and out of these three Laxman Ram who was also the informant of the case made a big dent in the prosecution version not capable of being salvaged and which in turn shatter the prosecution version itself. He gave out that he had heard the four culprits making conversation among themselves while standing by the side of the truck and at that time all those four were then taking name of each other. He also categorically stated that at that very time on the day of the occurrence he came to know the names of all those four as Ishwari Prasad, Mohan Singh, Bhopal Singh and Narayan Singh. Not only this, the witness specifically stated that the names of these four culprits were also mentioned by him in the report prepared at about 6 A.M. on the day of the occurrence and which was delivered at the Police Out Post, Thal. We find that the F.I.R. was unnamed and none was nominated as the culprit of the crime perpetrated against the victim of the case. There can be no gain saying that the highly damaging evidence of this witness of identification can be taken to assail fully the prosecution version in regard to the veracity of the test identification and involvement of these accused in the commission of the crime.

11- As submitted the evidence of informant Laxman Ram has a reflection on the evidence of Shankar Singh (P.W.4) who scribed the written report, Ext. Ka.11 on the dictation of said Laxman Ram the not mentioning the names of the culprits in the F.I.R., tell upon adversely also on his reliability. It is of significance that witness also admit of the fact that those four miscreants were engaged in conversation among themselves as stated thereto by other witness Laxman Ram. However, this witness gave out that those miscreants were engaged in conversation in English language and therefore he could not understand as to what they were talking about. In our view such a statement was deliberately made so that his conduct

may not be exposed to this extent that he was also able to hear and know as to what those four persons were talking about and in that conversation they were also naming each other, as stated by Laxman Ram (P.W.5).

12- In so far as the credibility of his identification evidence is concerned, it is also of significance that no special feature or profile of any of the culprit was got to be mentioned in the written report, although it is claimed by this witness that all the four persons remained in contact with him right from the evening of 21.4.1982 and he was also told to tell his name to those persons. In his evidence there is nothing to indicate that any special feature of any of those persons was noticed or observed by him so as to later on facilitate him to correctly identify them or any of these four. This aspect therefore raise grave doubt in his claim that he went on to correctly identify one of these two accused, namely, Mohan Singh and that too after more than a year of the occurrence. It may be recalled that the identification parade was held on 8.8. 1983 after more than one year and three months from the alleged occurrence. It will be too much to expect such a witness, who has not observed any special feature of any of the culprit, to identify correctly any of the culprit after such a long lapse of period and in the face of this peculiar aspect of the matter we find it difficult to place any reliance on his evidence also.

13- This takes us to the remaining evidence of Hayat Singh (P.W.1) and in relation to him also the similar reasoning of grave doubt in his veracity due to considerable delay between the date of the incident and the date of holding of the identification parade holds good. In other words it will be too much to accept that the tea shop owner on whose shop about 50 – 60 persons visit daily would have been able to remember the special feature or profile of those miscreants so as to enable him to correctly lay his hand upon any of them in the test identification parade. Even otherwise it is in the evidence that he was able to correctly identify Mohan Singh and despite this he failed to point him correctly out of the three accused in the dock in the court when a question was asked to him by the Presiding Officer. He categorically stated that he could not point

out correctly as to out of the accused in the dock, which is Bhopal Singh, which one is Ishwari Prasad and which one is Mohan Singh. If he had really seen the culprit on the day of the occurrence and therefore correctly identified accused Mohan Singh in the identification parade he was expected to correctly lay his hand upon this accused in the dock in the court and which is the substantive evidence of the identification legally admitted in evidence. Considering this aspect of the fact no reliance can also be placed on the evidence of this witness and as the things stand the identification evidence of the prosecution falls much too short to prove beyond doubt the participation of these accused or any of them in the commission of the crime in question.

14- Upon independent evaluation of the evidence on record, we are convinced that the learned Sessions Judge fell in error in placing reliance on the identification evidence of these three witnesses and the accused were wrongly convicted for the offences with which they were charged. In other words their appeals have force and are to be accordingly allowed.

15- In the aforesaid premise both the appeals succeed and are hereby allowed. The judgment dated 3-2-1986 is set aside and the accused Ishwari Prasad and Mohan Singh are held not guilty and acquitted of the charges under Sections 394 and 302/34 I.P.C. Both the accused are on bail. Their bail bonds are cancelled and sureties and discharged.

16- Let the record be sent back to the trial court.

(B.S. Verma, J.) **(Irshad Hussain, J.)**

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